APPEAL NO. 021596
FILED AUGUST 15, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). Following a contested case hearing held on May 23, 2002, the hearing officer resolved the disputed issues by determining that the appellant (claimant) sustained a work-related repetitive trauma injury to "at least his right wrist, elbow, and forearm"; that the date of this injury was (date 1), and not (date 2), as the claimant contended; that the claimant failed to timely report the (date 1), injury to the respondent (self-insured employer); and that although the claimant has, since August 16, 2001, been unable to obtain and retain employment at his preinjury wage as a result of the claimed injury, he did not have disability because his injury is not compensable. The claimant has filed a request for review, challenging the sufficiency of the evidence to support the finding that the date of injury was (date 1), as well as the finding that the claimant's notice of injury was untimely. The self-insured employer urges in response that the evidence is sufficient to support the challenged determinations.

DECISION

Reversed and remanded.

The claimant testified that he began driving a garbage truck for the self-insured employer in September 2000 and that in so doing, he had to turn his head to the right to look behind him and view the movements of the truck's side loader while operating switches on the sideloader control box with his right hand; that in _____ he began having right wrist pain; that his wrist began to hurt "all the time" because he was moving it throughout his 12-hour shifts to operate the side loader controls; and that it hurt more by the end of his shifts. He further stated that, apparently in _____, he told his supervisors about this pain and the problems he was having operating the side loader switches and they responded by relocating the control box so that it would better fit his hand, and by giving him a wrist splint; that these measures did not alleviate the pain; and that by (date 2), his pain was "a lot worse" and he reported it that day to supervisor (Mr. G). The claimant further testified that he was first treated for this injury on August 16, 2001, the date his treating doctor took him off work, and there was evidence that his employment was terminated on August 17, 2000, for absenteeism. The claimant also stated that he is 6'4" and a large man and that his right arm and neck movements were hampered by his tight fit inside the truck cab.

The claimant has obviously not appealed the findings that his duties as a senior sideloader operator were sufficiently repetitive and traumatic to cause injury to at least his right wrist, elbow and forearm; that he sustained damage or harm to the physical structure of his body in the form of a repetitive trauma occupational disease while in the course and scope of his employment; and that, as a result of the claimed injury, the claimant has been unable to obtain and retain employment at wages equivalent to his preinjury wage from August 16, 2001, through the date of the hearing. These findings

have become final by operation of law. Section 410.169. The claimant's appeal, while not specifically identifying the findings that are appealed, does appear to take issue with the sufficiency of the evidence to support those findings relating to the issues of date of injury and timely notice. We note that the hearing officer, after finding that the claimant's notice of injury was untimely, failed to make any findings concerning the existence of good cause for the untimely notice.

After his direct and cross-examinations, the claimant was asked by the hearing officer what he thought was causing the pain in his hand or arm in _____, and he responded, "you know, it was that box, being cramped up in there, my arm bent back all day long and moving them [control switches] up and down. . . . like a piano," and that he was aware that his difficulty was being caused by the location of the control box.

With regard to the date of injury and timely notice of injury issues, it was the claimant's position at the hearing--a position he continues maintain on appeal, at least in the alternative--that he trivialized his right upper extremity pain from its onset in _____ until (date 2), when the pain became a lot worse, and that he reported it that day to Mr. G. The self-insured employer contended that the claimant did not sustain an injury, as such, but had only pain which in and of itself is not an injury, which is defined in Section 401.011(26), and, thus, that he only gave the self-insured employer notice of pain, not injury, on (date 2). It is apparent from the documentary evidence, the parties' opening statements, and the claimant's testimony, that the only date of injury considered by the parties at the hearing was the (date 2), date. It was not until the hearing officer elicited from the claimant the testimony cited above concerning what the claimant thought, in _____, was the cause of his right upper extremity pain, that the possibility of an earlier date of injury was interjected and the carrier's representative then argued, in her closing statement, the alternative position that the injury date was in _____ and that the claimant's (date 2), reporting of the injury was therefore untimely. No specific evidence was adduced by either party for the purpose of establishing a _____ date of injury and no evidence was adduced, not even by the hearing officer, which pointed to (date 1), as the date of injury. Rather, that date appears to have been selected by the hearing officer because it was the last day of _____. See Texas Workers' Compensation Commission Appeal No. 011891 decided September 24, 2001, where the Appeals Panel remanded for further fact findings on a date of injury supported by the evidence because the hearing officer had evidence only of a date of injury in the latter part of October 2000 but nevertheless "deemed" the date of injury to be October 15, 2000.

A hearing officer is required by Section 410.163(b) to "ensure the preservation of the rights of the parties and the full development of facts required for determinations to be made." The Appeals Panel is empowered by Section 410.203(b)(3) to reverse the decision of a hearing officer and remand for "further consideration and development of evidence." Given the stated theories of the parties concerning the date of injury and notice of injury issues, the development of the evidence consistent with those theories, the interjection of the possibility of a substantially earlier date of injury during the hearing officer's examination of the claimant, and the lack of evidence identifying (date

1), as the date of injury, we are compelled to reverse the hearing officer's determination that the date of injury is (date 1), and to remand the case for further consideration and the development of the evidence on the date of injury and notice issues and for such further findings and conclusions as may be appropriate, including the existence of good cause and/or actual knowledge.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **CITY OF HOUSTON (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

CITY SECRETARY–ANNA RUSSELL
900 BAGBY
HOUSTON, TEXAS 77002.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Sue Kelley
Appeals Judge

_____
Robert W. Potts
Appeals Judge